Supreme Court, U. S.
FILED
MAY 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1792

In The
Supreme Court Of The United States

October Term, 1979

McALESTER CORPORATION, a corporation,
doing business as ALDRIDGE HOTEL,
HOTELS SERVICE COMPANY, a corporation,
TULSA APARTMENTS CORPORATION, a corporation,
CHARLES H. ALBERDING, an individual,
and J. E. SCALLY, an individual,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PHIL FRAZIER and ROBERT S. FARRIS
of FRAZIER, SMITH & FARRIS
1424 Terrace Drive
Tulsa, Oklahoma 74104

Counsel for Petitioners

INDEX

Page

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes and Rules Involved..... 3
Statement of Case 4
Reasons for Granting The Writ 8
Conclusion 14

Appendix A: Opinion of United States Court of Appeals, Tenth Circuit of February 11, 1980.....A1

TABLE OF CASES

Brennan v. Arnheim & Neely, Inc., (1973) 410 U.S. 512..... 8

Hodgson v. University Club Tower, Inc., 10 Cir., 466 F.2d 754 .....9, 11

Ray Marshall, Secretary of Labor v. McAlester Corporation, et al., (E.D. Okla.), 438 F.Supp 1005 (1977)..... 2

United States v. Blake, 5 Cir., 488 F.2d 101 13

STATUTES

28 U.S.C. §1254(1) 2

Rule 803(6) Federal Rules of Evidence 2, 3, 7, 12, 13

29 U.S.C. §203(r).....3, 5, 8

29 U.S.C. §203 (s) (1)..... 3

29 U.S.C. §206..... 4

In The
Supreme Court Of The United States

No. _____

October Term, 1979

McALESTER CORPORATION, a corporation,
doing business as ALDRIDGE HOTEL,
HOTELS SERVICE COMPANY, a corporation,
TULSA APARTMENTS CORPORATION, a corporation,
CHARLES H. ALBERDING, an individual,
and J. E. SCALLY, an individual,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Tenth Circuit entered in this matter on February 11, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto. The opinion of the United States District Court for the Eastern District of Oklahoma is reported at 438 F.Supp. 1005 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the District Court improperly admitted into evidence under Rule 803 (6), Federal Rules of Evidence, the operational reports of 33 non-party "hotel" corporations in order to establish an "enterprise" with an annual gross volume of business done of over $250,000 under the Fair Labor Standards Act, 29 U.S.C. §201-219, and whether the Court of Appeals erred in circumventing a ruling on that issue by holding that an "enterprise" was established because of testimony concerning the gross volume of said 33 non-party "hotel" corporations when

there was evidence in the record showing that some of those "hotels" catered to permanent residents and were thus not involved in "related activities" so as to constitute an "enterprise."

STATUTES AND RULES INVOLVED

29 U.S.C. §203(r) — "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . .

29 U.S.C. §203(s)(1) — "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce or employees handling, selling, or otherwise working on goods or material that have been moved in or produced for commerce by any person, and which . . . beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . .

Rule 803(6), Federal Rules of Evidence — The following are not excluded by the hearsay rule even though the declarent is available as a witness: Records of a regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the

time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

STATEMENT OF THE CASE

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §201-219, hereinafter referred to as the Act, to enjoin the defendants from violating the minimum wage requirements of the Act, 29 U.S.C. §206, and to restrain the continued withholding of back wages due as a result of the violations to persons employed at the Aldridge Hotel in McAlester, Oklahoma. The petitioners herein were the defendants in the trial court.

THE EVIDENCE

During the periods relevant to this action, the Aldridge Hotel was owned by Tulsa Apartments Corporation, from May 1, 1973, until December 31, 1973, and the Hotel was thereafter owned by McAlester Corporation from January 1, 1974, until November 11,

1976. At all times material to this action, Charles H. Alberding was the President of Tulsa Apartments Corporation and McAlester Corporation, and he and his wife and daughters owned a controlling interest in those corporations. During the same period, J. E. Scally was the Vice President of those two corporations and together with Charles H. Alberding and Mr. Alberding's wife constituted the boards of directors of the two corporations.

In order to reach the Act's jurisdictional requirement that there be an enterprise engaged in commerce with an annual gross volume of business done of not less than $250,000, the Secretary contended that the Aldridge Hotel together with 33 other "hotels" owned by 33 separate and distinct corporations which were not named as defendants to the suit constituted a single enterprise within the meaning of 29 U.S.C. §203(r). In fact, it was admitted by the Secretary that during the relevant times of this action the annual gross volume of business done by the Aldridge Hotel was less than the jurisdictional minimum of $250,000. So it was only by aggregating the annual gross volume of business done by the Aldridge Hotel with the annual gross volume of business done by the 33 non-party corporations that the Secretary could place the owners of the Aldridge Hotel under the provisions of the Act.

The ownership and management of these 33 non-party corporations were the same as for the Tulsa Apartments Corporation and McAlester Corporation in that Charles H. Alberding was the President of the 33 non-party corporations, and he and his wife and daughters owned a controlling interest in the corporations. J. E. Scally was also the Vice President of the 33 non-party corporations and together with Charles H. Alberding and Mr. Alberding's wife constituted the boards of directors of the 33 corporations. However, all of the 33 non-party corporations are separate and distinct corporations.

All of the "hotels" operated by the 33 non-party corporations are referred to as the "Alsonett Hotels". However, "Alsonett" is not a legal entity of any kind, but instead is merely a banner given thirty years ago to those properties in which Charles H. Alberding had an interest. The word "Alsonett" itself is simply a combination of the last names of three men whose combined idea it was thirty years ago to try and get into the hotel business.

Petitioners argued in the Trial Court that these 33 non-party corporations could not be considered as part of a single "enterprise" with the Aldridge Hotel because they did not involve related activities. Specifically, it was argued that some of the "hotels" were actually apartments because they catered primarily to permanent residents as opposed to transient guests. Petitioners also argued that

even if the required enterprise could be shown that the documents offered by the Secretary to aggregate the $250,000 jurisdictional minimum were improperly admitted as business records in violation of Rule 803(6), Federal Rules of Evidence. Specifically, it was argued that the testimony adduced from the sole sponsoring witness of the operational reports was deficient in all three component parts necessary for admissibility.

THE RULINGS BELOW

The District Court held that the 33 non-party "hotel" corporations (the "Alsonett Hotels"), including the Aldridge Hotel, constituted an enterprise within the meaning of the Act. The District Court also allowed the admission of the operational reports of the 33 non-party "hotel" corporations and thus aggregated the total gross volumes of business done to reach the jurisdictional minimum of $250,000. Consequently, in connection with their ownership of the Aldridge Hotel, the Court ordered Tulsa Apartments Corporation to pay back wages and accrued interest of $16,937.92 and ordered the McAlester Corporation to pay back wages and accrued interest of $55,214.00.

The Court of Appeals affirmed the finding of the District Court of an "enterprise" with an annual gross volume of business done in excess of $250,000. However,

the Court of Appeals circumvented ruling on the admissibility of the operational reports by holding that the testimony of Charles H. Alberding, to the effect that the "annual gross volume of all hotels would be somewhere in excess of $2,000,000.00", was sufficient to support the finding of the Trial Court as to the "enterprise" issue.

Petitioners submit that the Court of Appeals erred by taking the word "hotels" literally when there was evidence in the record to show that some of the so-called "hotels" catered primarily to permanent residents and thus were not performing related activities to the Aldridge Hotel so as to constitute an "enterprise".

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in cases of this type that petitioners were wrongfully held to be subject to the provisions of the Fair Labor Standards Act.

The initial point of analysis begins with a definition of the term "enterprise". This honorable Court stated in the case of *Brennan v. Arnheim & Neely, Inc.*, (1973) 410 U.S. 512 that:

> "Under the 'enterprise' definition of 29 U.S.C. §203(r), the three main elements of

> statutory definition are related activities, unified operation or common control, and common business purpose."

It is the "related activities" component of the "enterprise" definition with which petitioners take issue in the case at bar.

While the term "related activities" is not defined in the Act, it was held in *Hodgson v. University Club Tower, Inc.*, 10 Cir., 466 F.2d 745, that activities are related when they are the "same or similar". Under this standard, the Court in *Hodgson, supra,* went on to hold that the differences between hotels and apartment houses outweigh their similarities. It was reasoned that there was a meaningful distinction between establishments providing temporary quarters for transients and travelers and establishments providing a permanent place of residence for homemakers.

In fact this analysis was specifically utilized in the case at bar by the District Court to find that the Tulsa Apartments owned by Tulsa Apartments Corporation were not the same or similar and thus were not related to the activities of the Aldridge Hotel. Having recognized that distinction as it affected the Tulsa Apartments, the District Court then ignored the distinction by disregarding or overlooking testimony elicited by the Secretary which indicated that in quite a number of the "hotels"

owned by the 33 non-party corporations there were accommodations for permanent guests. In spite of the fact that the Secretary emphasized during his questioning of Charles H. Alberding that most or at least quite a number of the 33 non-party "hotels" had accommodations for permanent guests and even after going on to bring out that it was an established policy of those "hotels" to develop a more permanent trade, the District Court erroneously found that the 33 "Alsonett Hotels", including the Aldridge Hotel, constituted an enterprise within the meaning of the Act.

The Court of Appeals compounded this error when it sidestepped ruling on the admissibility of the operational reports of the 33 non-party "hotels" for the purpose of aggregating their annual gross incomes. Instead, the Court of Appeals circumvented ruling on this issue by holding that the $250,000 jurisdictional minimum had been established by the testimony of Charles H. Alberding in which he replied in the affirmative to a question by the Respondent's counsel as to whether the annual gross volume of all his "hotels" would be somewhere in excess of $2,000,000. As was just shown above, respondent's own counsel had just elicited testimony from Charles H. Alberding that most or quite a number of the so-called "hotels" had accommodations for permanent guests and even had a policy to develop more permanent trade. That

being the case, it was error for both the District Court and the Court of Appeals to include all of the 33 non-party "hotels" in the alleged enterprise with the Aldridge Hotel so as to bring the petitioners within the Act. In view of the testimony concerning the hotel versus apartment status of the 33 non-party "hotels", to lump them all together as hotels is contrary to the holding of *Hodgson, supra.*

Once this distinction between hotels and apartment houses is applied to the so-called "hotels" owned by the 33 non-party corporations, it becomes clear why the evidentiary ruling of the District Court on the admissibility of the operational reports of those corporations is so pivotal. For without the aggregate annual gross volume of business done by the 33 non-party corporations as reflected in these operational reports, the jurisdictional minimum of $250,000 would not have been reached as to the Aldridge Hotel, and thus the Secretary would not have had a case. In attempting to have these operational reports admitted into evidence, the respondent sponsored them through the testimony of an employee of Hotels Service Company. Hotels Service Company is a corporation owned and operated in the same manner as Tulsa Apartments Corporation and McAlester Corporation. However, rather than owning a hotel or apartment house, Hotels Service Company provides services to such businesses in the form of engineering, selection of equip-

ment, accounting, taxes and finance. Hotels Service Company's business consists of providing such services to participating hotels, apartments, country clubs, etc. and not just to those various businesses in which Charles H. Alberding has interests.

It quickly became apparent during the testimony of this employee, who was head of the accounting office of Hotels Service Company, that she knew absolutely nothing about the derivation of these operational reports which were received by her office every month.

In pertinent part, the business records exception to the rule against hearsay evidence, found in Rule 803(6), of the Federal Rules of Evidence, has three component parts which are: (a) a . . . report . . . made at or near the time by, or from information transmitted by, a person with knowledge, (b) if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report . . ., (c) all as shown by the testimony of the custodian or other qualified witness.

None of the above requirements were met by the respondent in offering these reports into evidence.

The employee did not know who prepared the reports nor what information was used to prepare them. She did not know if the reports were accurate nor who sent the

unsigned reports. She did not know when the reports were prepared or if they were prepared in the regular course of business of the various clients of Hotels Service Company. It was not the regular practice of Hotels Service Company to make these reports nor was the employee the custodian or other qualified witness because she could not vouch that the requirements of Rule 803(6) had been met.

Despite the employee's complete lack of knowledge concerning the operational reports of the 33 non-party "hotels" corporations, the Trial Court admitted them into evidence and thus used the aggregate annual gross volumes contained therein to find an "enterprise" and thus bring the petitioners within the Act. This erroneous admission of evidence violated a fundamental evidentiary rule which was stated as follows in *United States v. Blake*, 5 Cir., 488 F.2d 101:

> "While the trial court does have wide discretion in determining the admissibility of documents as business records, (citations omitted), there must be minimal authentication proof to give them reliability."

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

PHIL FRAZIER and ROBERT S. FARRIS
of FRAZIER, SMITH & FARRIS
1424 Terrace Drive
Tulsa, Oklahoma 74104

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, ROBERT S. FARRIS, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the petitioners herein, hereby certify that on May 9, 1980, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Certiorari on Ray Marshall, Secretary of Labor, respondent herein, by depositing such copies in the United States Post Office, Tulsa, Oklahoma, with first class postage prepaid, properly addressed to the post office address of CARIN ANN CLAUS, Solicitor of Labor, the above named respondent's counsel of record, at U.S. Department of Labor, Washington, D.C. 20210, and to Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

DATED May 9, 1980.

ROBERT S. FARRIS
of FRAZIER, SMITH & FARRIS
1424 Terrace Drive
Tulsa, Oklahoma 74104

APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1303
No. 78-1304

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Appellant — Cross-Appellee,

v.

McALESTER CORPORATION, et al.,

Appellees — Cross-Appellants

Appeal From The
United States District Court
For The
Eastern District Of Oklahoma
(D.C. # 75-117-C)

Phil Frazier of Frazier, Graham, Smith & Farris, Tulsa, Oklahoma, for Appellees — Cross-Appellants.

David Grant, United States Department of Labor (Carin Ann Clauss, Solicitor of Labor, Donald S. Shire, Associate Solicitor, Dennis D. Clark and Ouida C. Prevost, attorneys, and James E. White, Acting Regional Solicitor, on the Brief), for Appellants — Cross-Appellees.

Before SETH, Chief Judge, HOLLOWAY, Circuit Judge, and BROWN, District Judge*.

PER CURIAM.

---

*Honorable Wesley E. Brown, of the District of Kansas, sitting by designation.

This is an appeal of an action brought by the United States Secretary of Labor to enjoin defendants from violating the minimum wage and recordkeeping requirements of the Fair Labor Standards Act, 29 U.S.C. §§201-219. The trial court enjoined defendant McAlester Corporation, d/b/a Aldridge Hotel, from violating minimum wage provisions of the Act. Defendants McAlester Corporation and Tulsa Apartments Corporation, in connection with their ownership of the Aldridge Hotel, were enjoined from withholding payment of minimum wages and interest to employees of the Aldridge

Hotel. Defendants Charles Alberding and J. E. Scally were held not to be "employers" under the Act and the action was dismissed as to them. The Secretary of Labor appeals dismissal of the suit as to Alberding and Scally, and defendants cross-appeal as to those portions of the judgment adverse to them.

There are two main issues to be considered on appeal: First, whether there was substantial evidence to support the finding of the trial court that the "enterprise" had a gross volume of over $250,000; and second, whether defendants Alberding and Scally were "employers" under the Fair Labor Standards Act.

The action concerns the employees of the Aldridge Hotel in McAlester, Oklahoma. This hotel was owned by defendant Tulsa Apartments Corporation for part of the time in question and by defendant McAlester Corporation for a time. Defendant Charles Alberding owned the controlling interest in McAlester Corporation and in thirty-three other nonparty corporations operating hotels (the "Alsonett Hotels"). Charles Alberding was president and defendant J. E. Scally was vice-president of McAlester Corporation and each of the thirty-three nonparty corporations. Hotels Service Company, owned by J. E. Scally and the wife of Charles Alberding, provides such services to hotels as improvements, engineering services, accounting services, tax returns, and procuring financial assistance and insurance. The great majority of this company's business is done for the Alsonett Hotels and other Alberding interests, including the Aldridge Hotel.

In order that an "enterprise" be subject to the Fair Labor Standards Act, it must have an annual gross volume of at least $250,000. 29 U.S.C. §203(s)(1). The trial

court found that the gross volume of the entire Alsonett Hotels enterprise was to be considered and sufficient to bring the Aldridge Hotel under the Act. Defendants on appeal do not dispute the proposition that the hotels owned by Charles Alberding may be considered together with the Aldridge Hotel to constitute a single "enterprise." Rather, they argue that the financial records admitted to show annual gross volume of business did not come within the business records exception to the hearsay rule, Fed. R. Evid. 803(6). It is, however, not necessary to decide the rule 803(6) issue because Mr. Alberding in his testimony stated that the "annual gross volume of all hotels would be somewhere in excess of two million dollars." This is sufficient to support the finding of the trial court as to the "enterprise" issue.

The Secretary in his cross-appeal asserts that the trial court erred in holding that defendants Alberding and Scally were not "employers" under the Fair Labor Standards Act. It is urged that the court used the wrong standard for determining whether defendants were employers, and that the court improperly ignored a stipulation and an admission by defendants to the effect that defendants Alberding and Scally were indeed "employers" under the Act.

The term "employer" is defined in Section 203(d) as "any person acting directly or indirectly in the interest of an employer in relation to any employee." As the Fourth Circuit has said, this definition is quite broad, "and courts have accordingly found an employment relationship for purposes of the Act far more readily than would be dictated by common law doctrines." Schultz v. Falk, 439 F.2d 340, 344 (4th Cir.), *vacated on other grounds*, 414 U.S. 190.

The trial court here found there was no employment relationship because there was no showing of " 'substantial control of the terms and conditions of the work of [the] employees' of the Aldridge Hotel in McAlester, Oklahoma. Falk v. Brennan, 414 U.S. 190." Marshall v. McAlester Corp., 438 F. Supp. 1005, 1011 (E.D. Okla). This is, however, not the standard contemplated by the Act, but in any event the pretrial order contained a stipulation by the parties in part as follows:

> "Defendant, Charles H. Alberding, . . . has been, an officer of defendants, McAlester Corporation, Hotels Service Company and Tulsa Apartments Corporation, . . . acting directly and indirectly in the interest of said corporations in relation to their employees."

The same stipulation was made as to J. E. Scally. The language of this stipulation tracks the Act's definition of "employer." "The trial court may not disregard the facts stipulated to by the parties or require evidence to support them." United States v. Sommers, 351 F.2d 354, 357 (10th Cir.). "As a general rule, a stipulation is a judicial admission binding on the parties making it, absent special considerations." Vallejos v. C. E. Glass Co., 583 F.2d 507, 510 (10th Cir.), It was error to ignore the stipulation of fact that set the defendants well within the Act's definition of "employers."

It may also be noted that the attorney for the defendants conceded at trial that Mr. Alberding and Mr. Scally would be considered "employers" under the Act if the Government carried its burden of proof that the various hotels constituted an "enterprise," thus bringing

the Aldridge Hotel employees under the Act. He acknowledged that, "If we are under the act we will admit that under the act we would be employers." As this burden was met, it was error to ignore the concession and the stipulation by the parties.

The judgment is affirmed as to the proof of the existence of an "enterprise" with annual gross volume of business in excess of $250,000. The judgment insofar as it holds that defendants Alberding and Scally are not "employers" is reversed and the case is remanded.